Denver Law Review

Volume 29 | Issue 6 Article 1

1952

Vol. 29, no. 6: Full Issue

Dicta Editorial Board

DICTA

VOLUME 29

1952

DICTA

Published monthly by the Denver Bar Association, the Colorado Bar Association, and the University of Denver College of Law.

SUBSCRIPTIONS AND CONTRIBUTIONS: 702 Midland Savings Building, Denver 2, Colorado, ALpine 1355.

CONTENTS

Volume XXIX, Number 6, June, 1952

THE TREATY MAKING POWER

At the Mid-winter Meeting of the American Bar Association in Chicago last February, the House of Delegates approved a resolution favoring an amendment to the Federal Constitution relative to the operation of Treaties, reading as follows:

> "A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect. A treaty shall become effective as internal law in the United States only through legislation by Congress which it could enact under its delegated powers in the absence of such treaty."

The Association is deeply concerned as to the possible effect of the Genocide Convention and the Covenant on Human Rights, as well as other similar Treaties, upon the domestic affairs of the States and the Nation.

The Louisiana State Bar Association, On May 10, 1952, unanimously adopted a resolution favoring an amendment to the Federal Constitution providing that Executive Agreements or Treaties with foreign nations shall not become the internal law of the land unless implemented by appropriate legislation, and that no such legislation shall be valid if contrary to or in excess of the powers delegated to the Congress by the Constitution.

The action taken by the House of Delegates of the American Bar Association was by no means unanimous and the Standing Committee on Peace and Law through United Nations, and other United Nations supporters, opposed such a constitutional amendment. The following articles by Mr. Justice Moore and other members of the Colorado Bar present some aspects of this controversy. The Colorado Bar Association has taken no action on the matter to date.—*Editor.*

SABOTAGE OF AMERICAN FREEDOMS

JUSTICE O. OTTO MOORE
of the Colorado Supreme Court

Since the subject which we will consider deals generally with the United Nations organization and the charter thereof, it seems advisable that we take a brief look at the condition which existed in the world at the time of the creation of that organization.

Within the generation which preceded the creation of the United Nations, millions of lives had been sacrificed and inconceivable value in material world wealth had been consumed by the gluttonous appetite of the giant war machines of the earth. Two-thirds of the population of the globe were sick, hungry, ill-clothed, ill-housed and oppressed. At long last we began to realize that time and space had been annihilated by the intervention of the airplane, radio, and numerous other evidences of scientific endeavor. We became conscious of the fact that our world had

shrunk in size so that Moscow and Washington, D. C., were now closer together than New York and Philadelphia were at the time our nation was founded. We became fully persuaded of the truth that our world after all is relatively small and that every nation and civilization was vulnerable to annihilation and total disaster resulting from atomic warfare.

The blood bath of World War II, having been concluded in victory for the allied armies, we looked back upon the ruin and began to count the cost. The inevitable conclusion was reached that in modern warfare neither victor nor vanquished can emerge a winner. Immediately following the cessation of hostilities, the specter of the cold war between the Soviet Union and the so-called free democracries appeared on the horizon. An exhausted world sought to find a way to ensure against a recurrence of the heart-ache and suffering and the wanton waste of the resources of earth that are inseparably involved in a titanic world war. The average citizen in every land sought a means of ensuring peace with justice. Certain lessons had been definitely learned from experience of the not too distant past.

Most intelligent minds had agreed that we could not build peace either for ourselves or for the world by attempting to isolate ourselves. Isolation did not, and will not work. Most intelligent minds had learned that we could not build peace either for ourselves or for the world by appeasement of aggression. It did not work with Hitler and Mussolini and it will not work with the Communists or Stalin. Most intelligent minds had agreed that we could not bring permanent peace for ourselves or for the world simply by fighting and winning a war, because we have done this twice in the last thirty-five years and there is no assured peace. Most intelligent minds had concluded that we could not build permanent peace by eliminating a devil on the loose in the world, whether he be called a Czar, a Kaiser, a Hitler or a Mussolini. The result of fighting and winning World War I to "make the world safe for democracy" by getting rid of the Kaiser, was to make the world ripe for Hitler and Mussolini, who were worse. Getting rid of Fascism and Hitler through World War II brought us no peace but an ever more powerful Stalin and Mao Tse-Tung.

The Purposes of the United Nations

In this atmosphere and with this background, to which much more should be added to round out the full picture, men and women everywhere sought a means of assuring peace with justice, and thus it was that the United Nations came into being and a charter was adopted in the altruistic hope that peace with justice might be achieved through the co-operative effort of participating nations. Nothing that I say on this occasion is intended as a criticism of the lofty ideals and high purposes and ambitions which inspired the creation of the United Nations. These purposes were: First (and foremost) to maintain international peace

and security; second, to develop friendly relations among nations; third, to promote international economic and social co-operation; and fourth, to be a center for harmonizing the actions of nations in the attainment of these common ends.

On June 26, 1945, the charter of the United Nations was signed by the representatives of fifty nations. It became effective on October 24, 1945, when it was ratified by more than two-thirds of the countries whose representatives had signed it. This charter provided that there should be six principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat. I shall be speaking to you in a moment concerning some of the activities of the Economic and Social Council.

The United Nations was sold to us, and we accepted it, upon the basis that it was an association of sovereign states, *that it was not constituted as a parliament of man, nor as a federated government of the world,* but as an organization open to all peace-loving nations of the world on the basis of the principle of sovereign equality. The object to be accomplished—TO OUTLAW WAR!

THREAT OF WAR HAS NOT BEEN ELIMINATED

After almost seven years of activity on the part of the United Nations, grave problems cry out for solution in all parts of the world.

The icy tentacles of the cold war have not melted but have frozen over additional vast areas of the earth; in Korea planes, and tanks, and bombs, and guns, and bayonets—and men—clash in the bloody business of war; and for the year just ahead we plan to spend an enormous amount for armaments, for defense, an amount which when broken down to understandable terms means one million dollars for each ten-minute period throughout the whole year.

The world is sullen and angry and distrustful as the struggle for the minds of men begins to gather force and momentum. We contemplate the heavy cost in lives, and suffering, and treasure, which have been laid upon the altar of liberty in these United States as the price of freedom; we know that even at this very moment our sons and brothers fight and die on Heartbreak Ridge, or some other stony, cold Korean hillside—rightfully or wrongfully, as you would have it in your own appraisal of the events that put them there—they are there in the name of freedom. Well might we all pause in the mad rush of these days—pause at the shrine of Mr. Lincoln and with renewed purpose, "highly resolve that these dead shall not have died in vain, that this nation, under God, shall have a new birth of freedom."

America needs a rekindling of the fires of freedom and a better understanding of the fact that freedoms already have been

lost, and more are in danger of being lost, right here at home. It is unfortunate, but nevertheless true, that we seldom become aroused about the gradual loss of an intangible. Let someone attempt to invade our home and walk off with the furniture, or pitch his tent and take possession of five acres of our farm and we'll respond with a resistance that is in proportion to the visible emergency. But when some priceless unseen intangible thing like constitutional freedom is being slowly drugged into a state where it is more and more powerless and impotent to stand as a first line of defense against invasion upon the liberties and freedoms of the people, all too few of us make any note of it and all too few of us do or say anything about it. We come to our homes in the evening after what we call a hard day at the office or the shop; we pass quickly over the challenging headlines and the editorial pages of our daily press which bring to our attention each day the current developments in the creeping death process; we say "ho hum" and turn to the comic section or the sport page.

We have this generation all concerned about fighting communism, which is nothing more or less than super-statism where the government decides what the individual deserves and gives it to him with a vengeance. A man by the name of Paul Harvey on the radio a short time ago said, "I'm not so sure that I could explain to the young man lying half in and half out of the gutted tank on a Korean hillside why he had to die, why his dreams had to get shot full of holes. Why he had to spill his insides across some crummy, worthless Korean hillside when the freedoms back home for which he thought he fought were stolen while he was away." Our sons are spilling their blood under the flag of the United Nations. While our boys fight in Korea, fundamental concepts of American freedom are having a desperate fight for survival within the high councils of the United Nations and, as an American, I am certain that one of the greatest threats to freedom is to be found in the current trend of events within the councils of that body.

Freedom Threatened at Home

Following World War II, the United States ascended to the leadership of the western free world. We adopted an almost unlimited policy of participating in world affairs. There was an unprecedented resort to the treaty making power, *and this power has been used to accomplish purposes that could not possibly have been foreseen a generation ago.* We helped produce the United Nations Charter. We have adopted it as a treaty. Under this charter and the proposed developments thereof, the American people are today confronted with the question as to whether or not in an attempt to give greater liberty to other peoples in the world they will destroy their own freedoms.

Within the last generation there has been an incessant bombardment upon our long established concepts of constitutional

guarantees. By strained judicial interpretations, and, in many ways which for lack of time we cannot discuss, constitutional guarantees are becoming of uncertain value. If we can stem the tide at this point there yet is time to avoid irreparable loss. However, through the use of the treaty-making power we face new and grave threats to constitutional liberties. By a recent decision of the Court of Appeals in California this new threat is brought to light. It now becomes clear that by the adoption of a treaty even the Constitution of the United States and its Bill of Rights may be amended. The Charter of the United Nations may be the supreme law of the land and take precedent over and above the Constitution of the United States. Without doubt a treaty supercedes the Constitutions and laws of the several states. I quote from the opinion of the California court as follows: [1]

> "The Charter has become 'the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' U. S. Const., Art. VI, sec. 2. The position of this country in the family of Nations forbids trafficking in innocuous generalities but demands that every State in the Union accept and act upon the Charter according to its language and its unmistakable purpose and intent.
>
> "Since the Charter is now the supreme law of the land it becomes necessary to examine its provisions and guarantees and to interpret it in the light in which it was adopted by the participating nations." [2]

Keeping in mind the thought that whatever is adopted as a treaty, if self executing, may well become the supreme law of the land and take precedence over all else, let me point out to you a few specific instances among many, many more which could be mentioned, in which American freedoms are being sabotaged within the councils of the United Nations. The Economic and Social Council of the United Nations, one of the six principal units already mentioned, was given power by the charter "to make recommendations for the purpose of promoting respect for,

[1] Sei Fujii v. State, 217 P. 2nd 481.

[2] Since this article was prepared, the Supreme Court of California has affirmed the above mentioned judgment of the California Court of Appeals (242 P. [2d] 617). The court in a lengthy opinion, by a four to three vote, held the California Alien Land Law unconstitutional in that it violated the Fourteenth Amendment, although the court had previously held the act constitutional and the Supreme Court of the United States had affirmed that decision (263 U. S. 225). The California Supreme Court said that the provision of the charter of the United Nations, which was relied on by the Court of Appeals, was not self-executing for the reason that only broad general purposes and objectives of the United Nations organization were contained therein, and that in the absence of subsequent "implementing legislation" the United Nations charter did not automatically supersede the local California law.

and observance of, human rights, and fundamental freedoms of all." In carrying out this objective a commission consisting of representatives of fifteen nations was appointed, known as the Human Rights Commission. They have prepared a covenant on Human Rights. The American representative on the commission approved the document. It has the approval of the state department. It will ere long, unless public sentiment is roused in righteous protest against it, pass the hurdle of United Nations approval and be submitted for adoption by the United States as a treaty; and if this covenant on Human Rights is ever adopted by this nation as a treaty, or in any other manner, we would be binding ourselves to other nations to uphold and enforce foreign, totalitarian, communistic concepts of fundamental freedoms, diametrically opposed to our own, and the Bill of Rights of our national and state Constitutions would lie in ashes at our feet. As was stated by William Fleming in an article published in the American Bar Association Journal in November, 1951:

> "The United States delegation has, unfortunately, not realized that the struggle against communism is a global one, indeed. It is waged not only on the battlefields of Korea, but everywhere, including the Council chambers of the United Nations and the Human Rights Commission. American boys in Korea bearing the brunt of the Communist onslaught are fighting for the same ideas and ideals that ought to be upheld at the conference table. Our troops gave a magnificent account of themselves, but our delegates or those who instruct them lacked both courage and faith to refuse to sign a document so utterly alien to the American tradition."

The very first Article of our American Bill of Rights reads as follows: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances." Under the American concept these guarantees are absolute and ever present, and no circumstances or emergency can cause them to be set aside or rendered inoperative. Congress cannot place any limitations or restrictions on the free enjoyment thereof. But Congress does not make treaties and it now becomes clear that the exercise of the treaty-making power through the pressures behind the United Nations gives us cause for great concern. We are already in the United Nations. The Charter has been adopted. We are now considering in the United Nations the Covenant on Human Rights, adoption of which, as a treaty, has been recommended by appropriate United Nations committees.

Article 13 of this proposed covenant on Human Rights provides that, "Everyone shall have the right to freedom of thought,

conscience and religion," *but* it goes on to say that this freedom to manifest one's religion "shall be subject only to such *limitations as are pursuant to law* and are reasonable and necessary to protect public safety, order, health, etc."

Article 14 of this document, which if adopted might take precedence over the Constitution of the United States and knock out our state Bill of Rights, provides: "Everyone shall have the right to freedom of expression—to seek, receive and impart information—," *BUT* it goes on to say that this right carries special duties and responsibilities and "may therefore be subject to certain penalties, liabilities and restrictions, but these shall be such only as are provided by law and are necessary for the protection of national security, public order, safety, etc."

Under Article 2 of the covenant, free speech, free press, right to assemble and petition, can be suspended in case of "a state of emergency officially proclaimed by the authorities."

To all of these vague assurances—with their "ifs", "ands" and "buts" the United States already has bound itself to take "action in co-operation with the organization for the achievement of the purposes set forth in Article 55." (Charter.)

In 1786 Thomas Jefferson said: "Our liberty depends upon the freedom of the press and that cannot be limited without being lost."

Five days before the promulgation of the Declaration of Independence, the Virginia Assembly adopted a constitution which said:

> "Freedom of the press is the great bulwark of liberty. None but a despotic government would attempt to restrain it. If it be restrained all liberty falls."

It is an historical fact that every advance in individual liberty that has been recorded since the art of printing was invented has been won through the efforts of the courageous press. It also is an historical fact that every loss of liberty that has been recorded during the same period has been preceded by a subjogation of the press to the dictates of government. Goebbels was appointed Minister of Public Enlightenment in Germany in 1933 —Russia brought the Press under State Control in 1921—Peron in Argentina disposed of La Prensa.

If eternal vigilance is the price of freedom, now is the time to be vigilant. And I take the liberty here to suggest that there comes a time in the nature of things when patience is no longer a virtue. What I mean is illustrated by the way a congressman recently paraphrased a familiar quotation. He said, "If you keep your head when all about you are losing theirs—maybe you just don't understand the situation."

It is contended by those who see no danger in the vast expansion of the subject matter now being handled by treaty, that civil liberties in this nation cannot be adversely affected thereby.

It is stated that the essence of our freedoms is found in the First Amendment to the Bill of Rights (hereinabove quoted) and in the Fourteenth Amendment, and that these bulwarks of strength will stand against "any attack by any treaty at any time." This is wishful thinking and completely overlooks the fact that never in the history of the United States Supreme Court has a treaty provision been invalidated because inconsistent with a constitutional provision of either the state or nation. It entirely overlooks the plain truth that there is absolutely nothing in the First Amendment which operates as a prohibition against the making of treaties containing provisions limiting or denying the rights guaranteed by said amendment. The prohibition is that *Congress* shall not place limitations on the rights guaranteed. Congress does not make treaties. Every authority now available points in the direction of a determination that there are no limitations whatever upon the treaty-making power. In *United States v. Reid,* 73 Fed. (2d) 153, Mr. Justice Wilbur, speaking for the Ninth Circuit Court of Appeals, said, "It is doubtful if courts have power to declare the plain terms of a treaty void and unenforceable, thus compelling the nation to violate its pledged word, and thus furnishing a *casus belli* to the other contracting power."

HUMAN RIGHTS ARE AN INTERNATIONAL CONCERN

If our fundamental concept of American freedoms is cast aside and we adopt, in treaty form, the watered-down concept of fundamental freedoms contained in the Covenant on Human Rights, no man can say with certainty what the Supreme Court of the United States might do in the event that the restrictions on freedoms provided for in that covenant were invoked by those in authority. The United Nations charter determined without question that human rights are matters of international concern warranting action in concert with other powers. It thus has been declared a proper subject for consideration under the classification of Foregin Affairs. Mr. Justice Sutherland, in *United States v. Curtiss Wright Corp.,* 299 U. S. 302, pointed out with great emphasis that the broad statement that the Federal Government can exercise no powers except those specifically enumerated in the Constitution, *is true only in respect of our internal affairs,* and has no application whatever to the treaty-making power which deals with matters having an international scope.

As a nation, the United States of America has been generous with material gifts to the world. But the greatest gift we have given to the people of other lands has not been the abundance of our farms, the productivity of our factories or the wealth of our storehouses. The greatest gift we have given the world is the gift of hope for, and a belief in, freedom. America has shown the world that freedom works better than any other way of life. We have by our example inspired hope in the hearts of all men that someday they, too, may be free from the heavy hand of tyranny and the grinding misery of poverty.

America has shown the world that when men are free they can achieve the impossible. By giving free rein to the creative genius of every individual American we have released the energies of our people to build the huge mass production industries that pour out billions of dollars' worth of telephones, automobiles, radios, electrical appliances, refrigerators, stoves, airplanes, and a tremendous variety of other goods and services, all of which are within the reach of the ordinary worker. These goods have been distributed far beyond the boundaries of our nation into others, and thus have lightened the burden of people in all parts of the world. The products of American industry are sought after from Britain to Iran, from Norway to Japan.

America has given hope to the downtrodden, the hungry and the enslaved peoples of the world that the Golden Rule can be successfully embodied; not perfectly, but more perfectly than any other instrument to advance human welfare. We have created a government founded upon the principle that all men are equal before God and before the law, and that the dignity of the individual is the highest aim of government. Because we have done these things, because we have put freedom before all else, we have astounded the world by our progress and our abundance.

First, above all else we must preserve liberty at home, and possess it in truth and fact as well as in theory before we undertake to give it to the world.

We must generate and distribute freely light with which to illuminate the minds of men to the end that they may understand and effectively combat all forces seeking to undermine our system. We must generate and dispense freely the kind of heat which will warm the hearts of men everywhere and draw them together in better understanding of our common heritage and the necessity for its preservation. Above all, we must generate and dispense freely power; power to control the wills of men in the accomplishment of good; power to defend successfully, protect and preserve the freedoms for which America stands; power to compel accomplishment of the great objective which Pascal in the year 1650 said was the great need of his day. He then stated, "Justice and power must be brought together so that whatever is just may be powerful, and whatever is powerful may be just."

BAR ASSOCIATION MOVE TO NEW OFFICES

June first was moving day for the Denver and Colorado Bar Associations. We are now located in newer and somewhat larger offices in Suite 702, Midland Savings Building in Denver. Our phone number, ALpine 1355, remains unchanged. All members are invited to visit the Association offices, as always, when in Denver.

REBUTTAL TO MR. JUSTICE O. OTTO MOORE

ALEX STEPHEN KELLER
of the Denver Bar

In this issue of *Dicta* there appears an article by Mr. Justice Moore of the Colorado Supreme Court reflecting a certain degree of anxiety on the part of the Justice in connection with the treaty power of the United States as possibly over-riding, abridging, or eliminating some of the civil rights of citizens of the United States under the United States Constitution.

It is with some degree of hesitancy that I undertake to make a rebuttal in connection with these matters because not only is it popular in these days to "view with alarm", but also because of the keen and analytical mind of Mr. Justice Moore.

It is to be noted, however, that the analogies and arguments which appear in the article are likely to have the effect of emotionalizing a purely legal problem, and since this writer feels that a legal problem should be discussed in a logical, cool, and scholarly way, it is thought proper to discuss the article purely on the basis of decided cases and fundamentals of American jurisprudence.

The answers to some of the problems raised by the Justice are obvious. The Supreme Court of the United States has ruled again and again on some of the more important problems raised, and the legal problems are as a matter of fact so well settled that they have become fundamental principles on constitutional law.

It might be well at this point to state the problem: *Can a treaty abridge the personal liberties of citizens of the United States?* We must first examine the provisions of the Constitution of the United States which deal with this problem:

Article VI, paragraph 2:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; *and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.*" (Italics by writer.)

It is apparent just from reading the above provision what the answer to the problem is. One could very well stop right here without any further discussion, since the Justice in his article has placed the greatest stress on the proposition that there is a trend growing for treaties to supersede state laws and state constitutions. The answer to that very thing appears in the above italicized portion of Article VI which was written in 1787. Any treaty made under the authority of the United States is superior, in fact, to any state law or state constitutions.

Now if it were true that all personal liberty stems from state laws and state constitutions, one could reasonably have some quarrel with the propriety of Article VI but this is not the case. The Bill of Rights of the Federal Constitution and the Fourteenth Amendment thereto are the basis of almost all personal liberty within the United States, and those provisions are not changed, cannot be changed, and will stand as against any treaty made under the authority of the United States.

The basis for the alarm of some, as evidenced in the article by Mr. Justice Moore, is found in the case of *Sei Fujii v. State,* found in 217 P. 2nd, page 481, and later affirmed in 242 P. 2nd 617. It is rather singular that this case should be cited by the Justice in his article as the cause of danger of losing personal liberties when the case upholds personal liberties against a law which restricts them. This is the famous California land law case. The Court of Appeals held in substance, that the California Alien Land Law, which in effect prohibits Japanese persons from owning property in California, is contrary to the United Nations' Charter, and particularly Article 17 of the Declaration of Human Rights, made in pursuance of the Charter, and that since the said Charter is a treaty, the Alien Land Law being contrary thereto is void.

This decision has been bewailed in law circles all over the country on the theory that our national sovereignty is being impaired through the United Nations, and that before long the United States will be just a minor political subdivision of the United Nations. Nothing is farther from the facts. In the first place, the Declaration of Human Rights is a re-affirmation, perhaps in even stronger language, of the Bill of Rights already in existence in this country, and we can certainly not be harmed by a full enforcement of that Declaration of Human Rights. Secondly, Justice Wilson, who wrote the decision, could do nothing but what he did. The decision was unanimous and the basis for it is that the said Article 17 states "Everyone has the right to own property alone, as well as in association with others." The provision is so clear and so directly in conflict with the Alien Land Law that under Article VI of the United States Constitution, above cited, the conclusion of the Court is absolutely inescapable and in accordance with dozens of decisions of Courts throughout the United States. It might be well at this point to quote directly a few paragraphs from the decision:

> "(1) The Charter has become 'the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.' U. S. Const., Art. VI, sec. 2. The position of this country in the family of nations forbids trafficking in innocuous generalities but demands that every State in the Union accept and

act upon the Charter according to its plain language and its unmistakable purpose and intent."

In speaking of the Declaration of Human Rights the Court says:

(Page 488) "This Declaration implements and emphasizes the purposes and aims of the United Nations and its Charter.

"Democracy provides a way of life that is helpful; however its promises of human betterment are but vain expressions of hope unless ideals of justice and equity are put into practice among governments, and as well between government and citizen, and are held to be paramount. The integrity and vitality of the Charter and the confidence which it inspires would wane and eventually be brought to naught by failure to act according to its announced purposes. Its survival is contingent upon the degree of reverence shown for it by the contracting nations, their governmental subdivisions and their citizens as well.

"This nation can be true to its pledge to the other signatories to the Charter only by co-operating in the purposes that are so plainly expressed in it and by removing every obstacle to the fulfillment of such purposes."

The decision of the Supreme Court, found in 242 Pacific 2nd, page 617, affirms the Courts of Appeals but puts it on the theory that the United Nations Charter is not self-executing and thus does not control, but does hold that the land law is contrary to the Fourteenth Amendment of the Federal Constitution. It can certainly not be said that the United Nations Charter was disregarded because the land law has been upheld many times, including a decision by the United States Supreme Court, and there is no doubt but that without the United Nations Charter the California Supreme Court would not have declared the land law unconstitutional, although they state that they disregard the United Nations Charter. Certainly the California Supreme Court would not undertake to contradict the Supreme Court of the United States unless it felt an absolute need to hold the way it did, which need was caused by the passage of the United Nations Charter.

The decision here involved is sound, not only on the basis of Article VI itself, but on the basis of innumerable past decisions, the leading one of which is *State of Missouri v. Holland,* 40 Supreme Court, 382. This is the famous decision of Mr. Justice Holmes of the United States Supreme Court, which has been the leading case on this question ever since it was decided in 1920. In substance the decision holds that the treaty between the United States and Great Britain of 1916 regulating the killing of migratory birds, and the Act of Congress made in pursuance to that treaty, is not an unconstitutional interference with the right of

the States and is proper and enforceable. The reasoning of Justice Holmes is, as in his other decisions, clear, concise, and logical.

The general law is well stated in 11 American Jurisprudence, sec. 43, under Constitutional Law:

> "*Supremacy of Treaties.*—It is expressly declared in the Federal Constitution that all treaties made, or which shall be made, under the authority of the United States, together with the Constitution itself and the laws made in pursuance thereof, shall be the supreme law of the land. Therefore, when anything in the Constitution or laws of a state is in conflict with a treaty, the latter must prevail.
>
> "It is well stated that an act of Congress may supersede a prior treaty and that a subsequent treaty may supersede a prior act of Congress. Accordingly, while a state law may be void as inconsistent with a treaty, an act of Congress cannot be similarly declared to be invalid."

If the reader will look at that section he will find that there appear dozens of United States Supreme Court decisions on each point stated.

The law is very clear, in summary, that a treaty supersedes state laws and state constitutions. It is further well settled that an act of Congress supersedes a prior treaty and that a prior act of Congress is superseded by a later treaty.

What is the result of this basic law upon the argument that civil rights are abridged by the treaty-making power? No distinction is made in the article between civil rights under Federal as contrasted with State authority. As to state laws and state constitutions, and civil liberties derived solely from this source, naturally we have seen that treaties may supersede them. As to civil liberties derived from the United States Constitution and Federal statutes, it is quite apparent that the treaty-making power has no effect upon those rights and that they stand undiminished in spite of any treaty to the contrary. The United States Constitution and Federal laws are the supreme law of the land, as well as treaties, and any conflict between them could be resolved by passing an act of Congress after the treaty is made which would, under the cited authorities, have the effect of nullifying the treaty.

The article implies that the Declaration of Human Rights is contrary to our philosophy in the sense that it imposes certain restrictions upon our liberties. It was one of our own great Jurists who said, "You cannot shout fire in a crowded theatre." We have always had restrictions on these liberties in cases of national emergency or great public interest, and the Declaration of Human Rights does nothing more than restate those.

In connection with the possible abridgement of civil liberties by the United Nations Charter, the Charter is certainly not going to become an instrument for the abridgement of personal liberties. Its avowed purpose under the preamble is to promote and increase civil liberties. It is said in the preamble: "To re-affirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women, and all nations, large and small."

The essence of our civil liberties is found in the first amendment of the Bill of Rights, which has been included by implication in the fourteenth amendment. These two great bulwarks of American government, and of the rights of American citizens will stand as against any attack by any treaty at any time. They are the basis of the rights of our citizens. The alarm of some as to the power of treaties to lessen civil liberties is entirely without foundation because the first and fourteenth amendments to our Constitution are invulnerable and will serve to protect the rights of our citizens as long as this nation exists.

It is thus clear that the tree of civil liberties derives its life from the United States Constitution and Federal Statutes and since treaties are powerless under the law to attack the Federal Acts, the great tree of liberty cannot be undermined by any treaties which may be passed in the future. There is nothing to view with alarm. The California case cited merely states the law which had already been in effect since 1787 and is not a case which can, in any way, be interpreted to mean abridgement of civil liberties stemming from the first and fourteenth Amendments.

This discussion has dealt only with the legal problems raised. Much could be said about the necessity for the United Nations and the necessity of giving up perhaps some small degree of sovereignty in return for a united world to combat Communist aggression, but these are political matters and can be much more aptly discussed by others.

It might be well to say in closing that the proposed constitutional amendment offered by the American Bar Association and other sources, would, in the opinion of the writer, have a most disasterous effect because it would constitute a breach of contract in the sense that we would be breaching the United Nations Charter which is a contract between ourselves and many other nations. There is nothing the Kremlin would like better than to see us forced to withdraw from the United Nations or in any way incur the disfavor of that great organization.

Your blood may be the gift of life for someone you know. Call your local Red Cross office to arrange for a donation.

INTERSTATE COMPACTS AND THE FEDERAL TREATY POWER

GERALD L. STAPP
of the Denver Bar

This article will discuss the power of any state to contract with the several other states of our union via interstate compact. It may be said that the interstate compact, to the extent that it deals with local and regional matters, supplements the federal treaty power. Major concepts of the federal treaty power have been set down elsewhere in this issue. By express permission of the Constitution, though negatively stated, the several states are authorized to enter into compacts or agreements with sister states or with foreign countries, subject to approval of Congress.[1]

Interstate compacts are similar in nature to the treaties executed by sovereign nations in some respects, but there are also striking dissimilarities. In order to properly analyze the scope of the interstate compact power, brief mention of the history and background of interstate compacts must be made.

As earlier indicated, provision was made in the federal Constitution granting the states the right to consumate compacts with Congressional consent. This constitutional proviso does not, however, represent the origin of the concept of interstate compacts. While still in colonial status, the original American states were executing compacts as early as the latter part of the seventeenth century.[2] These compacts generally dealt with what Story has denominated as private rights of sovereignty, such as boundary disputes. When two or more colonies had ratified a compact, the instrument was sent to England for the approval of the Crown. Thus the parallel between early colonial practices and the Constitutional proviso may be easily drawn. It might also be added that the Articles of Confederation contained a similar feature.

While one portion of Section 10, Article I, of the Constitution creates the interstate compact power, another portion of the same section absolutely prohibits the several states from executing any treaties with any of the states or with foreign countries. Thus it is clear that the founding fathers distinguished between treaties and compacts. There appear to be several bases for this distinction. The first and paramount factor was the desire of the framers to prevent the several states from asserting sovereignty and power superior to that of the federal government in certain areas. Alexander Hamilton and his contemporaries were cognizant of the failure of the Articles of Confederation to establish this national superiority, which enabled the several states

[1] Article I, Section 10, Paragraph 3.

[2] Earliest agreement of this type was the Connecticut and New Netherlands Boundary Agreement of 1656.

to pursue their own course of action with little heed paid to the national government estalished by the Articles. The founders further felt that the national government should operate in the field of foreign relations unembarrassed by state meddling and intervention. They also wanted to prevent any political alliances among the states, which might prove embarrassing to the power of the federal government or otherwise disturb the balance of the union. For these reasons the states were prohibited by the Constitution from executing treaties among themselves or with foreign countries, and all such treaty-making power was delegated to the federal government. Yet these same states may execute compacts or agreements!

COMPACT DISTINGUISHED FROM A TREATY

The question still to be resolved is how to distinguish between a treaty and a compact. Generally speaking, a treaty deals with important aspects of the sovereignty of an independent nation, such as political alliances and economic adjustments. Compacts, on the other hand, are the instruments of quasi-sovereign governments which deal with local and regional matters, non-political in nature. Early decisions of the United States Supreme Court have indicated that the states are restored to their original treaty making status when Congress grants its approval to an interstate compact: In the early decision of *Rhode Island v. Massachusetts,* the Court said that when Congress had given its consent to a compact, "then the states were in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the Constitution, when given, left the States as they were before, as held by this court in *Poole v. Fleeger,* 11 Pet. 209 . . ." [3]

It is submitted that such construction of the compact phase of the Constitution is erroneous. If such construction were to be accepted, the framers of the Constitution would be represented as first absolutely prohibiting treaties by or among states and foreign countries, and then reversing themselves two paragraphs later. It does not follow that the later provision permitting compacts among the states or with foreign countries supersedes the earlier prohibition. It is clear that the founding fathers wished to distinguish between the two types of agreements.

Such construction of the compact section ignores the intent of the framers to preserve a federal hegemony in the field of foreign relations. It also disregards the past history of compacts executed by the colonies with the consent of the crown. It overlooks the clear language of the Constitution which prohibits any treaty, alliance or confederation among the states. By following this construction, it is conceivable that the states could create an alliance or confederation via an interstate compact, assuming Congress gave its approval. This would be accomplishing by

[3] 12 Pet. 657, 726.

indirection that which is expressly forbidden by the Constitution. Because of the Constitutional prohibition and because all treaty power of the states in the sovereign sense has been delegated to the federal government and cannot be re-delegated by Act of Congress to the several states, it is submitted that Congress hasn't the power to give its consent to a compact which is in essence a treaty.

It must again be said that as a basic distinction between compacts and treaties, the former may concern only quasi-sovereign matters, local or regional in nature, and possess no political features which would disturb the balance of the union or embarrass the federal government in the exercise of its delegated treaty power.

TREATIES ARE OF TWO BASIC TYPES

A further distinction may be found in the effect produced by an executed treaty as opposed to the effect created by consumation of an interstate compact. It is settled law that treaties in the sovereign sense may be of two basic types. The first sets up certain standards which are in themselves self-executing so that assisting national legislation is not required in order to have full force and effect on the country's municipal law. The second type is the treaty which must be assisted by national legislation before it has any force and effect on the country's internal law. If the treaty is self-executing, all prior municipal law, state or federal, is likewise repealed.[4] But Congress may subsequently enact legislation which abrogates an earlier treaty, even though it is a self-executing treaty. In this respect a treaty differs from an interstate compact which, after Congressional consent, repeals all prior inconsistent state legislation *and* prohibits the legislature from subsequently enacting any legislation in conflict with the compact. The latter prohibition is based on an analogy to that type of contract which may not be impaired by any state.[5] A question presents itself as to whether such a compact may even repeal inconsistent provisions in a state constitution. It could probably be successfully urged that the impairment of contract analogy extends to all the law-making function of the state, whether such functions be exercised through the constitution, state statutes, municipal ordinances, or by rules of the regulatory commissions.

It might also be contended that no state may have a provision in its constitution which prohibits the legislature from delegating any of its police power or authority to an interstate agency created by an interstate compact. Such a contention would be predicated on the theory that the states since early colonial days have disposed of certain phases of their sovereign power through compacts or agreements. One of these compacts enabled New Jersey to grant the State of New York a police jurisdiction over

[4] U. S. v. Belmont, 301 U. S. 324, 57 S. Ct. 758 (1937).
[5] State v. Sims, 341 U. S. 29, 71 S. Ct. 561 (April 1951).

its share of the waters of New York Harbor.[6] Other compacts have ceded portions of territory.

It would be urged that the framers knew the type of powers historically granted under interstate compacts and wished to continue this method of adjusting interstate problems. Since the framers set this proviso down in the Constitution, it may be considered a mandate which the states may not violate. A state may not, therefore, prohibit that which the Constitution authorizes. Just such a view has been adopted by Mr. Justice Reed in his concurring opinion in the case of *Sims v. State*.[7]

STATE MAY NOT WITHDRAW FROM A COMPACT UNILATERALLY

An additional limitation prohibits any state from unilaterally withdrawing from a compact to which it is signatory without the consent of its fellow signers. Contrari-wise, under present international arrangements, a sovereign nation may withdraw from its treaty commitments, subject to certain inherent risks, and may certainly repeal the treaty insofar as the country's own municipal law is concerned.

It is equally clear that no compact may be executed which would interfere with other powers delegated to the federal government, such as in the area of interstate commerce, navigable streams. It is submitted that in these areas Congress may give its consent to interstate operations by enacting a legislative declaration that Congress does not intend to operate in these areas. Thus an impediment is removed and such interstate operations are no longer deterred. This situation differs from the treaty power granted to the federal government, because in that situation, Congress is not granted the latitude or authority to authorize the states to execute treaties. Such treaties, as indicated earlier, are expressly prohibited by the Constitution.

In conclusion, it may be said that the interstate compact power of the states owes its derivation to the treaty-making power of sovereign nations; that Congress may not consent to treaties by the states; nor may a state impair a compact to which it has become signatory or otherwise attempt to withdraw from the compact on a unilateral basis. Thus, it becomes clear that a number of limitations on state power occur when the states ratify a compact which do not occur when a sovereign nation executes a treaty. Perhaps the most basic distinction at the present time is the power of the state to revoke the compact unilaterally. It has been seen that the Supreme Court has ruled the states are without power to unilaterally withdraw from a compact, because of federal constitutional limitations. On the other hand, it cannot be doubted that a sovereign nation can withdraw from its treaty

[6] The first compact was executed in 1833 and was incorporated in the Port of New York Authority Compact of 1923.

[7] 7 Supra, n. 5, at p. 33.

obligations by unilateral action. In the United States there is a framework of government which prevents the several states from failing to keep their bargains. Because there is no such federal government on a world-wide basis, there is nothing to prevent these nations from ignoring their treaty obligations.

Perhaps with the passing of time, this basic distinction between compacts and treaties will cease to exist. Until such time, it may be said that continuing uncertainty will cloud the enforceability of corresponding rights and obligations accruing under treaties executed by sovereign nations. Thus, we think that the genius of the framers of the Constitution has once again been demonstrated.

AMENDMENTS TO RULES OF CIVIL PROCEDURE

Adopted May 2, 1952, by the Supreme Court of the State of Colorado, to become effective May 6, 1952.

RULE 115 (a). STATEMENT OF CASE.

No abstract of the record is required. The plaintiff in error shall set forth in his brief a concise statement of the case containing all that is material to the consideration of the questions presented with appropriate folio references to the record. Pertinent provisions of the pleadings, documentary evidence, instructions given or refused, to which proper objections were made, findings and conclusions of the trial court, and judgment may be set forth in the brief or in an appendix thereto. (From Supreme Court Rules 36 and 38 and Code Sec. 442.)

RULE 115 (b). BRIEFS; WHEN FILED.

Except as provided by Rule 118 (b) and subdivision (k) of this rule, the brief of plaintiff in error shall be filed within 30 days after filing the record or, where application for supersedeas is pending, within 30 days from the date of the determination thereof unless the court makes final determination of the case on such application for supersedeas. The defendant in error shall file his brief within 30 days after service upon him of copies of the brief of the plaintiff in error. The plaintiff in error may file a reply brief within 20 days after service of the brief of the defendant in error upon him. Supplemental briefs shall be filed only upon leave of court. Fifteen copies of every brief shall be filed. (From Supreme Court Rules 38 and 39 and Code Sec. 442.)

RULE 115 (c). BRIEFS; CONTENTS.

Every brief filed in the supreme court, except one filed in support of or in opposition to a motion, shall contain separately in the order following:

obligations by unilateral action. In the United States there is a framework of government which prevents the several states from failing to keep their bargains. Because there is no such federal government on a world-wide basis, there is nothing to prevent these nations from ignoring their treaty obligations.

Perhaps with the passing of time, this basic distinction between compacts and treaties will cease to exist. Until such time, it may be said that continuing uncertainty will cloud the enforceability of corresponding rights and obligations accruing under treaties executed by sovereign nations. Thus, we think that the genius of the framers of the Constitution has once again been demonstrated.

AMENDMENTS TO RULES OF CIVIL PROCEDURE

Adopted May 2, 1952, by the Supreme Court of the State of Colorado, to become effective May 6, 1952.

RULE 115 (a). STATEMENT OF CASE.

No abstract of the record is required. The plaintiff in error shall set forth in his brief a concise statement of the case containing all that is material to the consideration of the questions presented with appropriate folio references to the record. Pertinent provisions of the pleadings, documentary evidence, instructions given or refused, to which proper objections were made, findings and conclusions of the trial court, and judgment may be set forth in the brief or in an appendix thereto. (From Supreme Court Rules 36 and 38 and Code Sec. 442.)

RULE 115 (b). BRIEFS; WHEN FILED.

Except as provided by Rule 118 (b) and subdivision (k) of this rule, the brief of plaintiff in error shall be filed within 30 days after filing the record or, where application for supersedeas is pending, within 30 days from the date of the determination thereof unless the court makes final determination of the case on such application for supersedeas. The defendant in error shall file his brief within 30 days after service upon him of copies of the brief of the plaintiff in error. The plaintiff in error may file a reply brief within 20 days after service of the brief of the defendant in error upon him. Supplemental briefs shall be filed only upon leave of court. Fifteen copies of every brief shall be filed. (From Supreme Court Rules 38 and 39 and Code Sec. 442.)

RULE 115 (c). BRIEFS; CONTENTS.

Every brief filed in the supreme court, except one filed in support of or in opposition to a motion, shall contain separately in the order following:

(1) A subject index of the entire brief.

(2) A table of all cases and statutes cited. Cases shall be first stated in alphabetical order giving title, volume and page with citations to the official reports and to the reporter system. Colorado statutes shall be cited by reference to official publication only. Each case or statute shall be indexed to every page on which it is cited.

(3) A concise statement of the case as required by subdivision (a) of this rule.

(4) A brief statement of the argument setting forth clearly and succinctly the points to be argued.

(5) The argument exhibiting clearly, separately, and without unnecessary repetition the points of fact and law being presented and citing the authorities and statutes relied upon. When other than a Colorado statute is cited so much thereof as may be necessary to the decision shall be printed in full either in the body of the argument or in an appendix. References to the record shall be accompanied by appropriate folio numbers. When the reference is to the evidence, to the giving or refusal to give an instruction, or to a ruling upon the report of a master, the folio citation must be specific, and if the reference is to an exhibit, both the folio number at which the exhibit appears and at which it was offered in evidence must be indicated.

(6) Such appendices as are proper under these rules.

Briefs of defendants in error need not contain a statement of the case unless that presented in the brief of plaintiff in error is controverted or deemed insufficient. Reply briefs shall be confined strictly to answering new matters raised by the adversary's brief.

(From Supreme Court Rules 37 to 42 both inclusive. Also from Rule 27, U. S. Supreme Court, and the rules of the U. S. Courts of Appeal.)

BOOK TRADERS CORNER

The recent Supreme Court decision holding a 1913 law to be effective even though omitted from the last two compilations of our statutes has impressed upon all of us the value of old statutes and session laws. Judge Edwin L. Reginnitter of Idaho Springs offers for sale a very rare collection containing all of the Colorado official statutes, territorial and state, from 1861 to 1921. These are contained in 71 volumes and you are invited to contact Judge Reginnitter concerning the acquisition of this prize.

William M. Swift, attorney, of 2118 North Tejon Street in Colorado Springs has a library of law books, all in good condition, which he offers for sale. For further information, contact Mr. Swift.

FORMS STANDARDIZATION COMMITTEE PRESENTS SAMPLE CIVIL JURY INSTRUCTIONS

The following jury instructions have been approved by the Forms Standardization Committee of the Colorado Bar Association and their use, in appropriate cases, is recommended. With the exception of Instructions 15 and 16, all have been approved by the District Judges Association. Instructions 15 and 16 have been approved in a recent Supreme Court case.

ROYAL C. RUBRIGHT,
General Chairman,
Forms Standardization Committee.

KENNETH M. WORMWOOD,
Chairman of Sub-committee
on Civil Jury Instructions.

No. 1

Negligence.

Negligence is the failure to exercise for the protection of others the care and caution that would be exercised by an ordinarily prudent person under the same circumstances. The failure to do what an ordinarily careful and prudent person would have done under all of the circumstances of the case, or the doing of something that an ordinarily prudent person would not have done under all of the circumstances of the case, is negligence.

* * * *

No. 2

Contributory Negligence

You are instructed that contributory negligence is such negligence on the part of the plaintiff as helped to produce the injuries complained of, and without which they would not have occurred. Such negligence need not have been the sole cause of the injuries, but merely such that but for the negligence of the plaintiff they would not have occurred.

* * * *

No. 3

Proximate Cause

Proximate cause is the efficient cause from which an injury flows, in unbroken sequence without any intervening cause to break the continuity.

* * * *

No. 4

Burden of Proof

You are instructed that the mere happening of an accident does not raise any presumption of negligence.

The burden of proof is upon the plaintiff in this case to establish all the material allegations of his complaint by a preponderance of the evidence.

The burden of proof is upon the defendant to establish his affirmative defense and counterclaim by a preponderance of the evidence.

By "burden of proof" is meant the obligation resting upon the party or parties who assert a proposition to establish the same by a preponderance of the evidence.

By "preponderance of the evidence" is meant that evidence which is most convincing and satisfactory to you and which you believe is a truthful account of the matters in controversy between the parties.

In order for you to reach a conclusion that the plaintiff in this case has proven his case by a preponderance of the evidence, you must feel satisfied in your minds, after hearing and weighing all the evidence, that the evidence produced by the plaintiff in this case outweighs that produced by the defendant.

In order for you to reach a conclusion that the defendant has proven his affirmative defense or counterclaim, you must feel satisfied in your minds, after hearing and weighing all the evidence, that the evidence produced by the defendant as to such affirmative defenses and counterclaim outweighs that produced by the plaintiff.

* * * *

No. 5

Unavoidable Accident

The jury is instructed that if you find from the evidence that the accident was unavoidable, then none of the parties is entitled to any damages.

An unavoidable accident is one happening suddenly and unexpectedly and without negligence on the part of anyone.

* * * *

No. 6

Emergency

A party suddenly confronted with an emergency due to no negligence on his part is not guilty of negligence for an error of judgment when practically instantaneous action is required.

* * * *

No. 7

Joint Enterprise

The law is that, if two people riding in an automobile are engaged in a joint enterprise or joint adventure and both share in driving, directing, controlling and governing the movements of the automobile, then the negligence, if any, of the driver is the negligence of the one riding with the driver.

* * * *

No. 8

Intoxication

A person is "intoxicated" or is "under the influence of alcoholic liquor" if such person is under the influence of intoxicating liquor to such an extent as to have lost to an appreciable degree the normal control of his body or mental faculties.

* * * *

No. 9

Traffic Violation

You are not a liberty to consider the violation of any municipal ordinance or State Traffic Regulation as negligence unless you find and believe from a "preponderance of the evidence," as elsewhere defined in these instructions, that the particular violation of the ordinance or regulation under the circumstances in evidence was the "proximate cause" of the accident, as elsewhere defined in these instructions, or materially contributed as a proximate cause of the accident in this case.

* * * *

No. 10

Experts

You have heard the testimony of the witnesses who have given evidence and testified as experts, giving opinions. This class of testimony is proper and competent concerning matters involving special knowledge or skill, or experience upon some subject which is not within the realm of the ordinary experience of mankind and which requires special research and study to understand. The law allows those skilled in that special branch to express their opinions and, upon a hypothetical set of facts stated to them, say whether or not, according to their experience and research, a fact may or may not exist. But nevertheless, while their opinions are allowed to be given, it is entirely within the

province of the jury to say what weight shall be given to them. The jurors are not bound by the testimony of the experts; their testimony is to be canvassed as that of other witnesses, just as far as their testimony appeals to your judgment, convincing you of its truth, you should adopt it; but the mere fact that the witnesses were called as experts and gave opinions upon a particular point, does not necessarily obligate the jury to accept their opinions as to what the facts are in the face of the testimony of witnesses claiming to have actual knowledge of the facts.

* * * *

No. 11

Preponderance of the Evidence

A preponderance of the evidence, as mentioned in these instructions, is not alone determined by the number of witnesses testifying, but also by the credibility of the witnesses and the weight of their testimony and of the evidence generally, and of these matters you are the sold judges. In determining the weight to be given to the testimony of the witnesses you should take into consideration their means of knowledge, strength of memory and opportunities for observation, as shown by the evidence in the case; the reasonableness or unreasonableness of their statements; the consistency or inconsistency of their testimony; the motives actuating them, so far as such motives appear from the evidence in the case; the fact, if it be a fact, that they have been contradicted by other evidence in the case; their bias, prejudice or interest, if any has been shown; their manner or demeanor upon the witness stand and all other facts and circumstances shown by the evidence, which in your judgment affected the credit due to them respectively. If, after considering all the evidence, you find that any witness has wilfully and corruptly testified falsely to any fact material to the issues in the case, you have a right to disregard the whole or any part of his or her testimony.

* * * *

No. 12

Credibility of Witnesses

The court instructs you that you are the sold judges of the credibility of the witnesses, and of the weight to be given to the testimony of each witness. In determining the weight to be given to the testimony of the witnesses you should take into consideration their means of knowledge, strength of memory, and opportunities for observation, as shown by the evidence in the case; the reasonableness or unreasonableness of their statements; the consistency or inconsistency of their testimony; the motives ac-

tuating them, so far as such motives appear from the evidence in the case; the fact, if it be a fact, that they have been contradicted by other evidence in the case; their bias, prejudice or interest, if any has been shown; their manner or demeanor upon the witness stand, and all other facts and circumstances shown by the evidence, which in your judgment affect the credit due to them respectively. If, after considering all the evidence, you find that any witness has wilfully and corruptly testified falsely to any fact material to the issues in the case, you have a right to disregard the whole or any part of his or her testimony.

* * * *

No. 13

General Instruction

These instructions contain the law that will govern you in this case, and in determining the facts you should consider only the evidence given upon trial. Evidence offered at the trial and rejected by the court and evidence stricken from the record by order of the court should not be considered by you. The opening statements and the arguments of counsel and the remarks of the court and of counsel are not evidence.

The arguments, statements and objections made by counsel to the court or to each other, and the rulings and orders made by the court, and the remarks made by the court during the trial and not directed to you, should not be considered by you in arriving at your verdict.

The court did not by any words uttered during the trial, and the court does not by these instructions, give or intimate, or wish to be understood by you as giving or intimating, any opinions as to what has or has not been proven in this case, nor as to what are or are not facts in the case.

No single one of these instructions states all the law applicable to the case, but all of these instructions must be taken, read and considered together, as they are connected with and related to each other as a whole.

* * * *

No. 14

Sympathy

Jurors in the trial of a case, such as this one, are apt to allow their feelings of sympathy on the one side, or their feelings of prejudice on the other, to induce them to render a verdict which the law does not consider proper because such a verdict would be contrary to the law and contrary to the evidence.

Therefore, you are instructed that you should not be governed or influenced by sympathy for the plaintiff because he was injured in an accident and you should not be governed or influenced by any prejudice or feeling either in favor or against the plaintiff, or in favor of or against the defendants, but in arriving at your verdict in this case you should be governed solely by the evidence given from the witness stand and the instructions of the Court.

* * * *

No. 15

Last Clear Chance No. 1

A plaintiff who has negligently placed himself in a situation of imminent peril, and is either unconscious of his peril, or unable to avoid the danger, or both, may nevertheless recover damages of the defendant who negligently inflicts injury, if the defendant could have avoided the injury after he discovered, or by the exercise of reasonable care, could have discovered the plaintiff's peril.

* * * *

No. 16

Last Clear Chance No. 2

If there was a mere possibility that defendant might have avoided the accident, and that possibility rests upon split seconds, this is not enough to meet the rule of Last Clear Chance. Such circumstances may present a last, but not a clear chance to avoid the accident. In order for the defendant to be held liable under the Last Clear Chance theory, you must not only find that he had the last chance, but the last clear chance, to avoid the accident.

ARTICLE ON CURATIVE STATUTES IS NOW AVAILABLE

The editor has received many requests for copies of the article by Percy S. Morris entitled "Curative Statutes of Colorado Respecting Titles to Real Estate" which appeared in the November and December, 1949, issues of *Dicta*, Volume XXVI, Numbers 11 and 12.

Our supply of these issues has been exhausted for over two years and the cost of a further printing has been prohibitive. Because of the great demand, this article was duplicated and copies may now be obtained at the Bar Association Office, 702 Midland Savings Building, Denver, at a price of fifty cents each.

These copies, consisting of 36 pages bound in a durable folder, contain the original article without any attempt at revision.

CASE COMMENTS

CRIMINAL LAW—WHAT IS THE NECESSITY FOR PROOF OF CRIMINAL INTENT UNDER A FEDERAL CRIMINAL STATUTE WHICH MAKES NO REFERENCE TO INTENT? *Morissette v. United States,* 72 S. Ct. 240 (1952.) Joseph Edward Morissette was convicted of knowingly converting to his own use property of the United States, i. e., some apparently abandoned practice bomb cases which were rusting into the ground on a government reserve. Morissette discovered these bomb cases while hunting for deer. To his trained junkman's eye they had possibilities for profits, and, thinking to realize some benefit out of an otherwise fruitless hunting trip, he hauled the bomb cases away in his truck during broad daylight. He later realized $84.00 from the sale of the metal in these cases.

After investigation by a curious patrolman, Morissette was arrested and convicted in the U. S. District Court for the Eastern District of Michigan under Title 18, U. S. C. A,. Sec. 641 (1948), which provides:

> Whoever embezzles, steals, purloins or knowingly converts to his own use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money or thing of value of the United States . . . if the value of the property does not exceed the sum of $100, shall be fined not more than $1000 or imprisoned not more than one year, or both.

Notably, the above section was a consolidation of Sections 82, 87, 100 and 101 (G) of Title 18, U. S. C. A. (1940), which had been so worded that the element of intent was clearly necessary before the crimes therein set out could be found.

The trial court refused to admit evidence of Morissette's belief that the property had been abandoned, and it instructed the jury that the element of intent, not being specifically set out in the statute, was not a necessary element of the crime.

The U. S. Court of Appeals for the 6th Circuit affirmed Morissette's conviction on appeal,[1] and the Supreme Court granted certiorari. Mr. Justice Jackson, delivering the opinion of the Court, said: "This case would have remained profoundly insignificant, but it raises questions which are both fundamental and far reaching . . ."

How far can the doctrine of "Public Welfare" [2] offenses be extended by the omission of the element of intent in statutory definitions of common law crimes? The distinction between crimes

[1] Morissette v. United States, 187 F. 2d 427 (1951).
[2] Sayre, *Public Welfare Offenses,* 33 Col. L. Rev. 55 (1933).

mala in se and crimes *mala prohibita* has been the subject of some controversy. The Court said concerning crimes *mala prohibita*: [3]

> While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted in this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity . . . The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect . . . Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.

The situation is otherwise as to crimes *mala in se*: [4]

> Stealing, larcency, and its variants . . . were among the earliest offenses known to the law . . . they are invasions of right of property which stir a sense of insecurity in the whole community and arouse public demand for retribution, the penalty is high and, when a sufficient amount is involved, the infamy is that of a felony . . .. State courts of last resort, on whom fall the heaviest burden of interpreting criminal law in this country, have consistently retained the requirement of intent in larceny-type offenses . . . Congress, therefore, omitted any express prescription of criminal intent from the enactment . . . in the light of an unbroken course of judicial decision in all . . . states . . . holding intent inherent in this class of offense, even when not expressed in a statute.

The court held that the term "knowingly converts" was used by Congress to plug the many loopholes that occur when a criminal statute too specifically sets out offenses that existed as common law crimes. "It is not difficult to think of intentional and knowing abuses . . . of government property that might be knowing conversions but which could not be reached as embezzlement, stealing or purloining."

Nevertheless, the defendant must have knowledge of the facts, though not necessarily the law, that make the taking a conversion, says the Court. Mere taking of possession is not enough.

> It is not apparent how Morissette could have knowingly or intentionally converted property that he did not know could be converted, as would be the case if it was in fact abandoned or if he truly believed it to be abandoned and unwanted property.[5]

The Court said that presumptive intent had no place in this case. Clearly that high tribunal is being very chary of inter-

[3] Morissette v. United States, ... U. S. ....., 72 S. C. 240, 246 (1952).
[4] *Id.* at 248.
[5] *Id.* at 254.

preting criminal statutes as being directed against persons innocent of scienter. Historically the Court is on sound ground. The idea of intent was manifested at an early date in the Pentateuchal legislation, Nos. XV: 27, 28. It grew through the Roman codifications of the law, reaching its culmination in the English law. Finally transferred to and dignified in the law of our own courts, *mens rea* has become firmly fixed as a necessary element of crime.[6]

In the belief of this commentor, presumptive intent has no place in any crime which existed at common law.

KENNETH SELBY

OIL AND GAS—TREASURER'S DEED WILL NOT PASS TITLE TO A PREVIOUSLY SEVERED MINERAL ESTATE WHICH WAS NOT SEPARATELY ASSESSED FOR TAXES—*Mitchell v. Espinosa* (.... Colo. ...., 1951-52 C. B. A. Adv. Sh. No. 18, p. 242). Lawyers concerned with oil and gas and other mineral interests in Colorado were greatly interested in the Colorado Supreme Court's recent decision in the case of *Mitchell v. Espinosa, supra.* In this case the court held that a tax deed to land by description will not pass title to a previously severed mineral estate, where such an estate was not separately assessed. This holding raises some very real problems in real estate law and may seriously affect some existing oil and gas interests.

The United States issued a patent to the real estate in question to Mitchell in 1912. In 1926 Mitchell conveyed the land to Hamer by warranty deed, reserving (in the habendum clause) "one half of oil right." A tax deed was issued to Jacobson in 1933. The interest reserved in Mitchell had not been separately assessed. In order to avoid the necessity of a quiet title suit, Jacobson took quit claim deeds from both Mitchell and Hamer. The deed from Mitchell referred to and excepted the one-half interest reserved to him in the original warranty deed. In the present case plaintiffs instituted a quiet title suit to establish their interests in the minerals involved, claiming under Jacobson, the grantee in the tax deed.

One or two preliminary questions settled by the court in this case may be of interest. The court noted that the tax deed in question was not issued until fifteen days after the day fixed for such issuance in the notice thereof to the owner. In holding that this discrepancy in dates did not void the tax deed, the court said:

> If the deed does not actually issue until a date subsequent to that fixed by the notice as being the day when it will issue, no substantial right of the person entitled to redeem has been lost or impaired; on the contrary, the right to redeem continues, in this case for fifteen days, beyond the time fixed by the notice.

[6] Social Science Encyclopedia, p. 126.

In so holding the court expressly overruled the recent case of *Tewell v. Galbraith.*[1]

Further, the court held that it will construe an instrument so as to give effect to every part thereof if possible; consequently, the reservation of the oil rights in Mitchell by his deed to Hamer was held good although it appeared in the habendum clause rather than in the granting clause.

The principal question in the case, however, was whether or not the tax deed to the surface of the land in question passed title to the mineral right reserved by Mitchell. This question has been the subject of apparent conflict in other states. In view of this conflict and the absence of any decision on the point in Colorado, careful attorneys in this state have long advised their clients to request separate assessments of mineral estates held by them. This was the advice given by Mr. Willard S. Snyder in an article published in *Dicta.* Speaking of the question involved here, Mr. Snyder said:[2]

> The best that can be hoped for is what might be called an educated guess. . . . If a person is the owner of a severed mineral estate . . . it is suggested that he write to the assessor requesting a separate assessment. . . . If minerals are not being produced thereon it will be assesed for a nominal amount . . ."

The above note of caution was entirely justified at the time, but it now appears that the ax falls not upon the one who failed to assure a separate assessment of his mineral estate, but upon the one who took his ever-worrisome tax deed for granted.

The court built its argument that Mitchell's mineral interest had not been lost in carefully logical steps. Quoting from the opinion:

> In the instant case, from and after the date of severance of the oil rights, there were two separate and distinct freehold estates in the property which theretofore had been assessed as a unit. . . . It is clear that before a valid tax deed can be issued . . . there must have been a valid assessment of the property . . . Under section 81, chapter 142, '35 C. S. A., a sufficient description "for the assessment of such lands" is mandatory . . . Where a separate estate consisting of . . . minerals . . . is created by reservation thereof, a sufficient description of this property for assessment purposes requires specific reference to the severed estate. . . . If the separate estate of the owner of the oil interest is held to be included in a description by section number, without more to identify the severed interest, the result would be that the estate in oil is taxed without notice to the

[1] 119 Colo. 412, 205 P. 2d 229 (1949).

[2] *Taxation and Mineral Interests,* 27 DICTA 225 (1950). Be it justly said to Mr. Snyder's credit that his "guessing" was never far from wrong.

> owner, "under the guise of taxing the property of another. The courts do not favor such a result." *Washburn v. Gregory Company,* 125 Minn. 491. 147 N. W. 706 . . .

Certainly it is true that a severed mineral interest is a separate freehold estate, that a valid tax deed must be based on a valid assessment, that a valid assessment must include a valid description, and that a valid description must describe the separate interests of separate owners. The question that courts of various states have struggled with is whether the duty to assure the proper description, and thus a valid assessment, falls upon the owner or upon the assessor. This case places that duty squarely upon the assessor, so far as tax deeds are concerned, by saying:

> We are satisfied that where oil or mineral rights have been severed from real estate and are owned by persons other than those who hold the surface rights, a failure on the part of the owners to report the mineral rights to the assessor will not supply the essential requirement of an assessment of those severed rights as a condition precedent to a valid tax deed covering said severed interest in land . . . Identification of the person who was at fault for the lack of a valid assessments is of no importance.

In so holding the court follows the leading Minnesota case of *Washburn v. Gregory Co.,* quoted above. The court distinguishes the case of *Richards v. Kerr,*[3] which seems to use contrary language, on the ground that there the only interest involved was freehold estate. After conveyance of same, the assessor had continued to assess it in the name of the first owner. It was held that the true owner could not invalidate a treasurer's deed because the land had been assessed in the name of his predecessor in interest. It has been said that the Colorado case of *Kansas City Life Ins. Co. v. Prowers County Oil and Gas Co.*[4] is contrary to the *Mitchell* case, but an examination of that case shows it to be clearly distinguishable on the facts.

In accepting the *Washburn* case as authority, the Colorado court has joined other states in this area, namely Kansas, New Mexico, Wyoming and Arkansas, all of which follow the Minnesota decision with little deviation.

Other states, such as Iowa and West Virginia, and notably Mississippi, have held that the burden of proper assessment is upon the owner—primarily because of state statutes controlling the question. There is no statute upon the point in Colorado. The California Supreme Court held in *McCracken v. Hummel*[5] that since there was in that case no evidence that the tax assessor had breached his duty, it was required to follow the well-estab-

[3] 53 Colo. 376, 127 P. 232 (1912).
[4] 81 Colo. 177, 254 P. 438 (1927).
[5] 43 Calif. 2d 302, 110 P. 2d 700 (1941).

lished presumption that he had performed his duty correctly; therefore, the oil interests passed in the tax deed with the surface estate.

Thus it appears that the Colorado court has followed the majority rule in a question that involves less conflict in other jurisdictions than appears at first blush. The rule of the *Mitchell* case seems a healthy one, and makes it easier for attorneys to determine approximately how the court will go with other questions of a similar nature.

The implications of the *Mitchell* case for the practice of real estate law in Colorado are, however, very great.

It has been a practice in Colorado for the title examiner to go back to the first prior tax deed in the chain of title, and, if that tax deed was valid on its face or was issued more than nine years before, to pass title as to mineral rights. This is in accordance with Real Estate Standard No. 47 (Steps are now being taken to revise this standard to conform to the *Mitchell* case.) Clearly, where that practice has been followed the title to mineral rights so approved may or may not be good, depending on whether there was a prior severance of a mineral estate, or depending perhaps on whether there was a quit claim deed from the owner of such an estate, not reserving the same. The curative statute [6] will not be of any help because there is now no reason to suppose that a tax deed of the surface of a parcel of land constitutes color of title to a prior severed mineral estate. Note that the tax deed in the *Mitchell* case was issued in 1933.

Nor is there any question of adverse possession, in most instances. It is a very well settled rule of oil and gas law that, where the mineral estate has previously been severed from the surface estate, adverse possession of minerals does not start until there has been actual exporation and discovery.[7]

It, therefore, becomes clear that in order to fully serve his client's interests the title examiner must go all the way back to the patent to assure that the title does not depend upon a tax deed which was assumed to convey a prior severed mineral estate. This perhaps does not place any very great burden upon an abstract examiner, but the implications for title search in the record room are far from encouraging. There is no way around it—the examiner must go all the way back.

A prominent attorney for a local oil and gas company reports that the above situation presents no new problems for title examiners for such companies. Their practice has been to go all the way back to the patent anyway. Mineral reservations may occur in the patents themselves. Further, where the situation of the *Mitchell* case has appeared, oil and gas companies have customarily paid double rentals.

[6] COLO. STAT. ANN., c. 40 §§ 146, 147 (1935).
[7] Calvat v. Juhan, 119 Colo. 561, 206 P. 2d 600 (1949).

The *Mitchell* case was decided on good authority and with only one dissent—and that dissent referred only to the overruling of *Tewell v. Galbraith, supra.* It is certainly a landmark in Colorado law. It would seem that this decision will remain one of the most significant in recent years.

We cannot leave this case comment, however, without discussing this one point: It seems that the subject in controversy in the *Mitchell* case was largely one of gas rather than oil. The original reservation in the deed from Mitchell to Hamer was of "one half of oil right." Under the cases such a reservation excepts only oil rights, and all other minerals pass by the grant. To that extent, could this have been useless litigation?

DONALD S. MOLEN
WALLACE L. VANDER JAGT

ANNUAL CONFERENCE OF THE TENTH JUDICIAL CIRCUIT

All members of the Bar are cordially invited and urged to attend the sessions of the Annual Conference of the Tenth Judicial District which will be held in the United States District Court Room in the Post Office Building in Denver on July 17, 18, and 19, 1952.

The first session begins at 10:00 A. M. on Thursday, July 17th, with an address of welcome by Hatfield Chilson, President of the Colorado Bar Association. Each morning session thereafter begins at 10:00 A. M. and each afternoon session at 2:00 P. M. until the end of the conference at noon on Saturday, July 19th. An unusually outstanding array of judges and legal personalities will feature this year's program of addresses and panel discussions.

The entertainment arranged includes dinner at the Teller House in Central City on Thursday evening, July 17th, to be followed by a performance of the opera "La Boheme". On Friday at 6:15 P. M. cocktails will be served at the University Club in Denver prior to the annual banquet which this year features an address by Justice Harold H. Burton of the United States Supreme Court.

Copies of the program for the Conference and tickets for the banquet may be obtained from Robert B. Cartwright, Clerk, United States Court of Appeals in Denver.

DISTRICT TRAFFIC COURT CONFERENCES

The Colorado Highway Safety Council, in conjunction with the University of Colorado Law School, the Colorado Municipal League, the State Association of County Commissioners, the Colorado Sheriffs' and Peace Officers' Association, and the Colorado Bar Association will conduct a series of district traffic court conferences during the month of July. The dates and places of these conferences are as follows:

July	8 Sterling	July	22 Durango
July	9 Greeley	July	23 Alamosa
July	15 Colorado Springs	July	24 Montrose
July	16 Pueblo	July	29 Grand Junction
July	17 Trinidad	July	30 Glenwood Springs
July	18 Lamar	July	31 Steamboat Springs

The conferences will be day long conferences and will be held insofar as possible in the district courtroom. Under tentative plans, the registration will begin at 9:00 a. m. The conference will begin at 9:20 a. m. with a welcoming address followed by a keynote address describing the conference theme and the history of the development of traffic court conferences. This will be followed by a panel discussion on current traffic court problems, both administrative and substantive, and following that will be an address on problems frequently encountered in traffic court. The afternoon session will begin at 1:30 with a sound movie entitled "A Day in Traffic Court". This will be followed by a few short talks on phases of traffic courts, and by a model traffic court demonstration. Residents of the immediate area of each conference—judges, traffic officers, prosecuting attorneys, members of the bar generally—will make up the morning panel and the cast for the afternoon model court demonstration. Each member of the bar is urged to attend the conference nearest his office. Members of the bar who have a particular role in traffic court procedure, either as prosecuting attorneys or as defense counsel, are especially urged to attend. The conferences have been developed at the suggestion of a statewide conference called by the governor and are designed to improve traffic court procedure. All persons present will have an adequate opportunity to participate in the discussions.

The Colorado Bar Association is a pioneer in the field of district traffic court conferences. In 1944 the Colorado Bar Association sponsored a series of district traffic court conferences, which were the first held in the United States and which became a model for district traffic court conferences subsequently held by many states. During the war such conferences were largerly eliminated, but with the increase in traffic deaths and the increase in traffic on the road, it is now imperative that these conferences be reestablished, so that traffic court procedure may be improved to keep pace with traffic problems.

CERTIFICATION OF LEGAL INSTRUMENTS URGED

Certification of legal instruments by attorneys has received the sanction of the Board of Trustees of the Denver Bar Association, acting upon the recommendation of its Unauthoried Practice committee headed by Wm. Rann Newcomb. This action was taken in order to discourage the preparation of such documents by laymen, encourage careful draftsmanship and make authorship apparent on the face of the instrument for future consultation or correction.

The board recommended that this certification be done by means of a stamp reading:

"I certify that I drafted
this instrument.

.....
Attorney at Law."

In order to encourage the use, and pass on savings in the purchase of certification stamps, a quantity lot has been procured. These are now available at the Bar Association office, 702 Midland Savings Building, for $1.00 each.

The association took this step only after consultation with other bar groups which have adopted the practice, and after securing a favorable opinion from the American Bar Association's Committee on Professional Ethics and Grievances. It is contemplated primarily that such certification be placed on deeds, trust deeds, releases, mortgages, notes, contracts of sale and other instruments dealing with the transfer of real estate. However, it is also recommended for wills, contracts and all other legal documents which an attorney may prepare for his client. In cases of complicated contracts, which may be the product of two or more attorneys, there would be no necessity for its use, nor should an attorney feel required to use it in any situation where he believes that its use may be a disservice to his client.

If used extensively by the attorneys of the state in connection with conveyancing, however, it could be a very important first step in helping to prevent the preparation of such documents by real estate brokers and others. The Unauthoried Practice committee is continuing to study ways and means of implementing this entirely wholesome practice. Such possibilities are the printing of association forms of conveyancing which could be copyrighted and used exclusively by attorneys with the certification printed on. Active steps are also being taken to hit unauthorized practice through the courts.

Notwithstanding other measures which may be taken, however, the use of the certification is important in itself, and in a letter to all members of the Denver Bar Association, Mr. New-

comb stated "There should be no delay in its enthusiastic and wholehearted acceptance by the members of the bar. The use of the stamp, of course, is purely voluntary. The success of the practice, however, depends entirely upon you and the generality with which it is used."

COURTROOM AMENITIES IN CHICAGO

So far as is known, nothing like the following incident has happened in the Denver court, although every prosecutor and every defense lawyer in a criminal case has been heard making muted mutters that his Honor, the Judge, really should be sitting at the defense table or at the prosecution table, as the case may be. This actually occurred in a criminal court in Chicago, according to the official report of the Illinois Supreme Court: [1]

> "Many times during the trial altercations took place between the attorney for the defendant and the trial judge. The attitude of the attorney towards the judge was very provoking and on numerous occasions the judge, at the instigation of the attorney, digressed from orderly procedure and argued with him. The first occasion came when he asked the judge whether he would like to testify. Later, after an objection to a question had been sustained, he criticized the judge by stating that he, the judge, never got very far in the practice of law because he didn't know how to cross-examine. This provoked a discussion as to which one paid the greater income tax. Later, after another objection had been sustained, the judge was accused of not liking the truth. As the trial proceeded, the altercations became more heated and at one point the attorney referred to another judge by his last name—Rooney—and the judge asked him if he meant Mickey Rooney. There were numerous other heated discussions that had nothing to do with the issues and at one point the attorney referred to the judge as "assistant State's attorney'."

Contributed by Max D. Melville of the Denver Bar.

COUNTRY LAWYER IS NEEDED

Paonia and the entire north portion of Delta County is in need of a lawyer to take over an established law office. Anyone interested may contact Clair H. Hadley, Town Clerk of Paonia, Colorado, or phone FRemont 0113 or AComa 3771 in Denver.

comb stated "There should be no delay in its enthusiastic and wholehearted acceptance by the members of the bar. The use of the stamp, of course, is purely voluntary. The success of the practice, however, depends entirely upon you and the generality with which it is used."

COURTROOM AMENITIES IN CHICAGO

So far as is known, nothing like the following incident has happened in the Denver court, although every prosecutor and every defense lawyer in a criminal case has been heard making muted mutters that his Honor, the Judge, really should be sitting at the defense table or at the prosecution table, as the case may be. This actually occurred in a criminal court in Chicago, according to the official report of the Illinois Supreme Court: [1]

> "Many times during the trial altercations took place between the attorney for the defendant and the trial judge. The attitude of the attorney towards the judge was very provoking and on numerous occasions the judge, at the instigation of the attorney, digressed from orderly procedure and argued with him. The first occasion came when he asked the judge whether he would like to testify. Later, after an objection to a question had been sustained, he criticized the judge by stating that he, the judge, never got very far in the practice of law because he didn't know how to cross-examine. This provoked a discussion as to which one paid the greater income tax. Later, after another objection had been sustained, the judge was accused of not liking the truth. As the trial proceeded, the altercations became more heated and at one point the attorney referred to another judge by his last name—Rooney—and the judge asked him if he meant Mickey Rooney. There were numerous other heated discussions that had nothing to do with the issues and at one point the attorney referred to the judge as "assistant State's attorney'."

Contributed by Max D. Melville of the Denver Bar.

COUNTRY LAWYER IS NEEDED

Paonia and the entire north portion of Delta County is in need of a lawyer to take over an established law office. Anyone interested may contact Clair H. Hadley, Town Clerk of Paonia, Colorado, or phone FRemont 0113 or AComa 3771 in Denver.

MARRIED BY J. P. "DURING GOOD BEHAVIOR"

From the musty archives of Mecosta County, Michigan, via Milton E. Bachmann's column "From the Editor's Desk" in the *Michigan State Bar Journal,* comes this little nugget as proof, says Mr. Bachmann, "that at the J. P. level the administration of justice has made less than turtle progress, and as a suggestion that the unauthoried practice of the law is no worse today than it was years ago."

"The story," says Probate Judge Benjamin W. Franklin, "was culled by one of my daughters from research material on county history."

Here is the tale:

In the early history of Mecosta County, a new justice of the peace developed quite a law practice, drafting deeds, wills, mortgages and other papers. Then came the day that he was called upon to perform his first marriage. As the young couple approached, the justice arose, took off his hat and announced:

"Hats off in the presence of the Court."

This being done, he had the couple stand before him.

"Now raise your right hands," he ordered.

"You, John, do you solemnly swear, to the best of your knowledge and belief, that you take this woman to have and to hold for yourself, your executors, administrators and assigns for your and their use and behoof forever?"

"I do," answered the groom.

"You, Alice, do you take this man for your husband, to have and to hold forever, and do you further swear that you are lawfully seized in fee simple, are free from all encumberances, and have good right to sell, bargain and convey to said grantee yourself, your heirs and assigns forever?"

"I do," said the bride, somewhat doubtfully.

"The consideration will be $1.50, John," said the Court.

"Are we married?" asked the bride.

"Not until the consideration is paid," the justice replied.

After some digging, the $1.50 was produced and duly deposited with the Court. When the money had been carefully tucked in the judicial pockets, the judge announced:

"Know all men by these presents, that I, being in good health and of sound and disposing mind, in consideration of the sum of $1.50 to me paid, do by these presents declare you man and wife, during good behavior and until otherwise ordered by the Court, so help you God."

From the Journal of the American Judicature Society Vol. 35, p. 151, Feb. 1952.